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No. 03-9877

Supreme Court, U.S.
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# In The Supreme Court of the United States

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**JON B. CUTTER, ET AL.,**

***Petitioners,***

**v.**

**REGINALD WILKINSON, ET AL.,**

***Respondents.***

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED FOR REVIEW

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 through § 2000cc-5, which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control.

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## INTEREST OF *AMICUS CURIAE*[1]

This case presents significant questions about the power of the legislative branch to make legal remedies available to persons seeking to exercise religious freedom guaranteed by the First Amendment of the United States Constitution. The Sixth Circuit has invalidated the Religious Land Use and Institutionalized Persons Act of 2000, which provides a legal remedy for incarcerated persons to challenge burdens on religious practice in prisons receiving funds appropriated by Congress. This case thus presents important questions not only about the extent to which Congress may establish conditions on the use of Federal funds as part of its exercise of the Spending Power and to regulate interstate commerce under the Commerce Power, but equally important questions as to Congress' power to provide for the General Welfare by accommodating inalienable rights of religious freedom. The outcome of this case also bears on social policy related to the compassionate edicts of many religious traditions, including the Judeo-Christian tradition, to "remember those in prison as if you were their fellow prisoners and those who are mistreated as if you yourselves were suffering" and "let the sighing of the prisoner come before thee." Heb. 13:3 (NIV), Ps. 79:11 (KJV).

*Amicus Curiae* — The Rutherford Institute — has as one of its principal purposes the elimination of governmental discrimination against persons or groups based on their religious beliefs. The resolution of the issues presented in this case is not only important to the jurisprudence of the Spending

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[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part. The attorney-authors of this Brief (as shown on the cover thereof) wish to acknowledge the assistance of Heather D. Gebelin, a third-year law student at the University of Pennsylvania Law School, in the preparation of this Brief.

and Commerce Clauses, but also to the extent to which Congress may accommodate the legitimate state interest in promoting religious freedom under the First Amendment, even for persons whose freedom has otherwise been restricted or limited as a consequence of anti-social conduct. The case is vitally important to the proper protection and balance of the inherent rights and liberties of humankind, as well as those granted to citizens under the Bill of Rights.

The Rutherford Institute is a non-profit civil liberties organization named for Samuel Rutherford, a 17th-century Scottish theologian and Rector at St. Andrew's University. With its national office in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants in the 50 states and to participate in significant cases that relate to and/or affect the Free Speech and the Religion Clauses of the First Amendment. Counsel for *amicus curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

## STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioners, Jon Cutter, *et al.*

## SUMMARY OF ARGUMENT

Even from colonial days and during the long period of established religion in the states (*after* the adoption of the Bill of Rights), legislative bodies in the United States recognized the special need for the benevolent protection of religious exercise. Prisoners of society were no exception to this protection. Though sometimes jailed for the very beliefs they sought to propagate, preachers were permitted to practice their religious beliefs behind bars. Importantly, such actions



occurred in Virginia, the home state of James Madison, the principal author of the First Amendment. Madison was acutely aware of these infringements on liberty. Indeed, he advocated protection for what he viewed as inalienable rights of religious conscience that were "precedent both in order of time and degree of obligation, to the claims of Civil Society."

Today, the Congress of the United States has affirmed the importance of these rights by granting prisoners a procedural remedy to protect religious liberties from infringement based on the whims and personal fancies of correctional personnel. In doing so, Congress is advancing the general welfare of prisoners, insuring that congressionally appropriated funds are not used to deny protected liberties, and safeguarding for all citizens the interest of religious freedom that the Framers identified as special in the First Amendment. The protected rights, if vindicated in individual cases, will also advance important purposes of rehabilitation, personal motivation and the advancement of moral standards in the prison environment.

This Court has held time and again that the state does not endorse every action that it permits or protects. Moreover, refraining from government "endorsement" of religion does not require callous indifference to the religious rights of the citizenry. Under the Constitution, Congress may choose to safeguard the individual exercise of protected religious liberties without violating the Establishment Clause. The holding of the Sixth Circuit to the contrary — in conflict with several well-reasoned holdings among the other Circuits — is out of step with this Court's precedents. At bottom, there is "play in the joints" in the interaction of the Religion Clauses, particularly where prisoners, on their own initiative in individual cases, are permitted to seek review of burdens imposed on religious freedom in highly controlled prison environments. This Court should not prohibit such *legislative* accommodation of constitutionally protected religious liberties

against burdens imposed by otherwise neutral laws of general applicability or arbitrary actions of prison officials.

## ARGUMENT

### I. INTRODUCTION.

This case arises at the intersection of the legitimate interests underlying the Free Exercise and Establishment Clauses. The central issue is whether the legal remedy provided to incarcerated persons under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") as a means of protecting their rights to religious freedom transgresses the proscriptions of the Establishment Clause. Congress enacted this remedy for prisoners in a highly controlled environment where the mix of force and the personal predilections of officials has produced demonstrable infringements on religious liberty. This brief will comment on the origins of the inalienable right to religious freedom (singled out for special protection by the Bill of Rights from most other fundamental rights) and the relevance of the Framers' views on those liberties. It will then suggest, in the context of the protected right, that the Establishment Clause does not bar Congress from enacting the remedy provided by RLUIPA.

### II. THE LEGITIMATE STATE INTEREST IN ACCOMMODATING THE FREE EXERCISE OF RELIGION.

In their separate opinions in *City of Boerne v. Flores*,[2] Justices O'Connor and Scalia presented disparate views concerning the historical interests underlying the Free Exercise Clause and whether judicial accommodation of religious practice is constitutionally mandatory when neutral laws of

[2] 521 U.S. 507 (1997).



general applicability infringe religious exercise.[3] That question is *not* presented in this case. Rather, the question is whether Congress, in recognizing the special significance of the free exercise of religion as a legitimate constitutional and societal interest, *may* make available to prisoners a procedural remedy requiring prison administrators to justify restrictions placed on religious exercise in federally funded prisons. In this vein, it is significant that Justices O'Connor and Scalia have both acknowledged a historical tradition of *legislative* accommodation of religious exercise at the time of the adoption of the Bill of Rights. *Id.* at 541, 557-560.

[3] Justice O'Connor marshaled extensive evidence showing that at the time of the adoption of the Bill of Rights, free exercise principles had an established history and a well-defined meaning in most of the colonies and in early state constitutions. In her view, "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses." *Id.* at 560 (O'Connor, J. dissenting). Justice Scalia disputed whether the meaning ascribed to the latter enactments actually provided substantive meaning to the newly adopted Free Exercise Clause and as ratified by the states. He suggested that the most telling failure in Justice O'Connor's accommodationist position was the lack of "a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation." *Id.* at 542 (Scalia, J. concurring). The paucity of such cases may be not so much testament to the failure of the Free Exercise Clause, as a shield against general laws of neutral applicability, but to the function of the Establishment Clause as a structural bar to the Federal regulation of religion or other individual rights. Given several state-established churches that continued for decades in the new union (with the last being dissolved in Massachusetts in 1833), religion was very clearly understood to be a matter for regulation by the states, not by the Federal government. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 255, n.20 (1963) (Brennan, J. concurring); *Wallace v. Jaffree*, 472 U.S. 38, 99, n.4 (1985) (Rehnquist, J. dissenting); Daniel L. Dreisbach, *Thomas Jefferson and The Wall of Separation Between Church and State* 55-70 (2002); Phillip Hamburger, *Separation of Church and State* 155-180, 481-486 (2002).

## A. Religion and Prisons in James Madison's Virginia

Part of the unnoticed history of the origins of Free Exercise includes its early roots in colonial prisons. James Madison was the principal framer of the First Amendment, including the Free Exercise Clause.[4] Madison's strongly held views on religious freedom were not only the product of theological training at Princeton University (under its President, John Witherspoon, who was one of the signers of the Declaration of Independence), but also the result of his own personal experience with religious persecution in Virginia. There, he was not only a witness to religious persecution, but personally involved as an advocate in many cases.

During the time following the Great Awakening in the Colonies in the 1740s, Colonial Virginia experienced a spate of religious persecution fostered by the arrival of Presbyterians and Baptists in what otherwise had been a secure haven controlled by the Church of England. These preachers were not welcome in the established church and could not obtain

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[4] Fellow Virginian Thomas Jefferson often erroneously associated with the drafting and adoption of the First Amendment (*see Reynolds* v. *United States*, 98 U.S. 145 (1878)), was actually in France at the time of the Convention where the First Amendment was adopted and had only limited contact with Madison during the period. Jefferson and Madison did correspond, but only over Jefferson's concern that there was no Bill of Rights in the Constitution. Robert L. Cord, *Separation of Historical Fact and Current Fiction* 85-86 (1982). Jefferson's view of religious liberty appeared to be more restricted than Madison's and would limit it to beliefs, rather than actions. Judge McConnell indicates that "Jefferson's advocacy of a belief-action distinction placed him at least a century behind the argument for full freedom of religious exercise in America." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1452-53 (1990) (footnotes omitted) ("*Historical Origins*").



licenses for meetings or preaching, let alone preach in the established churches. When they preached at homes and in fields, they were frequently imprisoned. *See generally,* Lewis Peyton Lewis, *Imprisoned Preachers and Religious Liberty in Virginia* (1938) ("*Imprisoned Preachers*"). Preachers in Madison's native Orange County were charged with vagrancy and unlawful assembly and were regularly assaulted and jailed. The persecution extended to several other counties, including Culpeper, Chesterfield and Spotsylvania. *Id.* Writing to an old college friend about the imprisonment of the Baptist preachers, Madison averred that he had "squabbled and scolded, abused and ridiculed so long about it, to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all." William C. Rives, I *History of the Life and Times of James Madison* 44 (1859) ("*Life and Times*").

The imprisonment of these early preachers did not put an end to their preaching. To the contrary, they were permitted to preach and exercise their religion in and from the jails that held them. For example, Elijah Craig, a Baptist preacher in Orange County, was jailed in 1768 "for a considerable time," but engaged in "preaching through the bars to the people who resorted to the prison till he was confined to the inner dungeon where there was no opening save a hole in the door through which he received his food and water." *Imprisoned Preachers, supra,* at 135. Another account describes the treatment of the Rev. John Weatherford, a Baptist preacher from Chatham, Virginia, who was confined in the colonial jail at Chesterfield Courthouse for unauthorized preaching.

> His brethren and admirers flocked on Sunday to the village and thronged the yard of the jail.... [H]e would lift the window and thrust his hands through the bars that he might shake hands with his loyal followers. He would also preach through the window to the assemblage, and often in the ardor of

> delivery would thrust his hands through the bars in earnest gesture. Men of the baser sort were instigated to stand on either side of the window, and armed with knives, would slash his hands in unpitying cruelty until, it was said, his hands would stream with blood as he spoke, and sometimes in his gesticulations, forgetful of his wounds, he would scatter his blood on his hearers or on the ground.

*Id.* at 342-43. William Webber and Joseph Anthony were also imprisoned in Chesterfield in 1770, where it is said that during their three-month imprisonment, "[t]he space around the jail was the meeting place, and the sill of the jail window was the desk upon which lay their Bible and hymn book, while the iron grating was but slight interruption to their earnest utterances of the truth." *Id.* at 212. In Spotsylvania County, five men were imprisoned for unlawful preaching and held forty-three days, during which they preached through the bars. Patrick Henry assisted with their release and has been described as the "unwavering friend" of dissident preachers. *Id.; see also* Robert Baylor Semple, *History of the Baptists in Virginia* 41 (1894). Henry is also reported to have paid Rev. Weatherford's fine and won his release. *Imprisoned Preachers, supra,* at 346.

In Culpeper County, just north of Madison's Montpelier Plantation, the persecution was even worse. The Rev. James Ireland, after preaching at a residence and being given the choice "not to teach, preach or exhort, for twelve months and a day, or go to jail," chose the latter. *Id.* at 161. When he later preached through the bars of the Culpeper jail, his listeners were interrupted by horses galloping through the crowd. *Id.* at 163. Ireland also described miscreants who "got a table, bench, or something else, stood upon it, and made their water in my face" and who also attempted to blow him up with gunpowder. *Id.* at 163-64. When this did not work, his persecutors crushed pods of Indian pepper, mixed it with



brimstone and burned it near the jail door "so that the whole jail would be filled with the killing smoke, and oblige [Ireland] to go to cracks, and put [his] mouth to them in order to prevent suffocation." *Id.* at 164.

### B. Madison's Involvement with Persecution and Religious Liberty

Persecutions such as those described above were well known to Madison. He "took a prominent stand in behalf of the removal of all disabilities, repeatedly appearing in the court of his own county to defend the Baptist nonconformists, was elected from Orange co. [sic] to the Virginia convention in the spring of 1776, and signalized the beginning of his public career by producing the passage of an amendment to the Declaration of Rights as prepared by George Mason, substituting for the term 'toleration' a more emphatic assertion of 'religious liberty.'" Johnson's III *New Universal Cyclopedia* 201 (1876), quoted in *id.* at 130-31.[5] Madison wrote to a friend "[t]hat diabolical, hell-conceived principle of persecution rages among some; and to their eternal infamy, the clergy can furnish their quota of imps for such purposes. There are, at present in the adjacent county not less than five or six well-meaning men in close jail for publishing their religious sentiments, which, in the main, are very orthodox." *Life and Times, supra,* at 43.

Madison believed that "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Everson v. Board of Education,* 330 U.S. 1, 65 (1947) ("*Everson*"), *quoting*

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[5] Madison objected on the ground that the word "toleration" [proposed by Mason] implies an act of legislative grace, which in Locke's understanding it was. Madison proposed, and the Virginia assembly adopted, the broader phrase: "the full and free exercise of [religion]." *Historical Origins, supra,* at 1443.

James Madison, *Memorial and Remonstrance Against Religious Assessments.* Religion thus "must be left to the conviction and conscience of every man." *Id.* at 64. Madison regarded it as an "inalienable right" and a "duty" that is "precedent both in order of time and degree of obligation, to the claims of Civil Society." *Id.* In his *Memorial and Remonstrance* to the Virginia legislature, Madison argued that

> [b]efore any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

*Id.* Thus, according to Madison, a prior claim is made upon all men and women by their religion which Civil Society is bound to acknowledge, notwithstanding the civil status of the individual. Indeed, this view comports with the rights declared in the Declaration of Independence and the subsequent Virginia Declaration of Rights authored by George Mason, with assistance from Madison. "Madison advocated a jurisdictional division between religion and government based on the demands of religion rather than solely on the interests of society." *Historical Origins, supra,* at 1453. This jurisdictional division operated between the national government and the states *vis-à-vis* the Establishment Clause and between the national government and individuals insofar as the individual liberties of the Free Exercise Clause were concerned. Dreisbach, *supra,* n. 3, at 67-70.

The principles that emerge from Madison's view of religious freedom are (1) that all men are endowed with the



inalienable right to religious freedom, (2) that this right has its origins in the Creator and (3) that it precedes Civil Society. As Madison said, "[i]f all men are by nature equally free and independent, all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights." *Everson,* 330 U.S. at 66 (citation omitted). This is little different from the founding principles of independence for this country spoken in its Declaration to King George I.[6] As Judge McConnell has concluded, "An understanding of the historical roots of free exercise exemptions...suggests...a peculiarly American conception of the relation between religion and government—one that emphasizes the integrity and diversity of religious life rather than the secularism of the state." *Historical Origins, supra,* at 1416.

### C. Madison's Original Proposal and Subsequent Drafts of the Free Exercise Clause in Congress

Madison's original draft of the Free Exercise Clause submitted to the House of Representatives read as follows: "The civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed." Hamburger, *supra,* n. 3, at 105. After considering his suggested language, the version reported from committee in the House of Representatives read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." Daniel L. Dreisbach, *Real Threat and Mere Shadow* 59 (1987). According to the contemporaneous congressional journal, Madison's understanding was that "Congress shall not establish a

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[6]"We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness...." *The Declaration of Independence* (U.S. 1776).

religion, and enforce the observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 60, *quoting* 1 *Annals of Congress* 730 (1789-1791). The House, with minor stylistic changes, finally adopted language proposed by Fisher Ames: "Congress shall make no law establishing Religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.* at 62.

The Senate debates were not recorded, leaving only the several proposals considered by the Senate. *Id.* at 63. The first proposal read: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed." *Id.* After debating amendments and other proposals, the Senate eventually adopted the following language: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion...." *Id.* at 64. This language was sent to a Conference Committee, where the phrase "rights of conscience" in the House version was dropped and the phrase "no law establishing religion" was replaced with "no law respecting an establishment of religion." *Id.* at 64-65.

The Free Exercise Clause as adopted and ratified by the States did not expressly accord protection to secular philosophies divorced from Religion. Judge McConnell observes that the "textual insistence on the special status of 'religion' [was]...rooted in the prevailing understandings, both religious and philosophical, of the difference between religious faith and other forms of human judgment." *Historical Origins, supra*, at 1496. This likewise appears to be the view reflected in the state constitutions and bills of rights adopted during the Colonial Period. *Id.* at 1455-56, 1499. Judge McConnell concludes that:



> The Madisonian perspective points toward pluralism, rather than assimilation, ecumenism, or secularism, as the organizing principle of church-state relations.... So understood, the free exercise clause also makes an important statement about the limited nature of governmental authority.... Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility.

*Id.* at 1516.

### D. The Special Need for Accommodating Religious Practice in Prisons

In Madison's day, imprisonment did not mean an end to the prisoner's religious duties. Indeed, in the case of the Baptist preachers, it only enhanced their message and the popularity of their cause. In this present day, Baptist preachers no doubt would not be permitted to preach as prisoners from prison grounds. However, despite changes in prisons and greater security on prison grounds, the principles of religious freedom and individual rights that Madison and the other Framers espoused are immutable. The freedom brought by the preaching of the Baptist preachers applies to the social setting of prisons, just as it does in other parts of Civil Society. The very fact is that prisons are insular and extreme environments may require not only a more tailored application of religious freedom, but also more heightened safeguards, because prison

> [a]mplif[ies] the "noise" of ordinary social life by intensifying competition, rivalry, hostility,

> manipulativeness and vindictiveness — as well as friendship, altruism, solidarity and generosity. This is partly why religion becomes unusually important for some prisoners. Religion casts a new clarity on life for some; and for others prison life creates a new need for clarity about religion.

James A. Beckford and Sophie Grant, *Religion in Prison: Equal Rites in a Multi-Faith Society* xi, 142 (1998). In this restrictive and volatile environment, there is the even more subtle danger of arbitrary application of personal predilections by prison guards and officials.

> This is the central evil in prison. It is not homosexuality, nor inadequate salaries, nor the cruelty and physical brutality of some of the guards. *The central evil is the unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners.* The existence of this evil necessarily leads to denial of communication, denial of right to counsel and denial of access to the courts. Prison becomes a closed society in which the cruelest of inhumanities exist unexposed.

Philip J. Hirschkop and Michael A. Millemann, *The Unconstitutionality of Prison Life*, 55 Va. L. Rev. 785, 811-12 (1969) (emphasis added). This long-recognized problem can be particularly difficult in recognition of prisoners' right to free exercise of religion. As Congress found in connection with its enactment of RLUIPA:

> Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their



> faith is at the mercy of those running the institution, and their experience is very mixed. It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.

Senator Orin Hatch and Senator Edward F. Kennedy, *Joint Statement on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774, 7775 (July 27, 2000, 106th Congress, 2nd Session) ("Senators Hatch and Kennedy, *Joint Statement on RLUIPA*"). The extensive testimony at hearings before the House of Representatives Judiciary Committee described numerous incidents of the administrative denial of religious observance, including breaches of dietary laws for Jewish and Muslim prisoners, refusal to purchase matzo (the unleavened bread required to be eaten by Jews on Passover), prohibiting Christian communion and even recording confessions made by prisoners to ministers. Marc D. Stern of the American Jewish Congress testified that in one unreported case brought under the Religious Freedom Restoration Act (RFRA), "the State of Pennsylvania took the position that it need not provide kosher food for inmates. It took a federal judge just minutes to decide to the contrary, a not surprising conclusion since the federal system and New York State all manage to provide such food without any great difficulty." *Hearing on The Need for Federal Protection of Religious Freedom and* Boerne v. Flores, *Before the Constitution Subcommittee of the House Comm. on the Judiciary,* March 26, 1998 (Prepared Testimony of Marc D. Stern, American Jewish Congress) (footnote omitted). Stern continued: "[A]nyone who engages in prison related work cannot help but be struck by the fact that what prison officials insist in one facility would bring chaos and a total breakdown of security, works perfectly well in apparently comparable facilities. RFRA works well to test

which predictions of chaos are legitimate and which are nothing more than the usual bureaucratic reluctance to accept outside oversight." *Id.*

In evaluating conflicts under the Religion Clauses of the First Amendment, this Court has routinely acknowledged that accommodation of the religious beliefs of the American people is permitted, and sometimes necessary, to achieve both the broad purposes of the Religion Clauses and the public welfare objectives of the modern administrative state. *See, e.g., McGowan v. Maryland*, 366 U.S. 420 (1961); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Roemer v. Board of Public Works*, 426 U.S. 761 (1976); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) ("Amos"); *Bowen v. Kendrick*, 487 U.S. 589 (1988). Thus, although the Free Exercise Clause may not arguably *require* society to accommodate religious practice under "neutral laws of general applicability," *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court has nevertheless recognized that "a society that believes in the negative protection afforded [by the First Amendment] to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.* at 890. Legislative accommodation of rights of conscience is consistent with earlier pronouncements of this Court that "government may (and sometimes must) accommodate religious practices and...it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-145 (1987); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Boerne v. Flores*, 521 U.S. at 507; *Bowen v. Kendrick*, 487 U.S. at 605-618.[7]

[7] Other public welfare legislation has likewise been upheld against facial Establishment Clause challenge when the purposes for the legislation were found to be aimed at legitimate public welfare objectives. Thus, in *Bowen v. Kendrick, supra*, this Court upheld Federal social legislation permitting religious organizations to administer teen and family life programs. The Equal Access Act, a



## III. THE PROVISION OF REMEDIES AND STANDARDS OF REVIEW FOR POTENTIAL INFRINGEMENT ON RELIGIOUS PRACTICE IN PRISONS DOES NOT CONSTITUTE AN ENDORSEMENT OF RELIGION.

The United States Congress passed the Religious Freedom Restoration Act and its progeny, the Religious Land Use and Institutionalized Persons Act, to rectify threats to the free exercise of religion in prisons. As previously mentioned, the enactment of each of these laws followed hearings[8] in which Congress collected evidence of a tide of religious discrimination that was otherwise irremediable under the rational basis criteria of *Employment Div. v. Smith*, 494 U.S. 872 .[9] While the judicial remedies allowed by the *Smith* case are not effective in challenging neutrally applicable regulations that burden religious exercise in prisons, the *Smith* Court nevertheless acknowledged that legislative action was appropriate to accommodate problems of religious exercise. *Id.* at 890. Despite this recognition, the Sixth Circuit has ruled

law granting students equal access to public school facilities for religious, philosophical, political and other speech, was also upheld by this Court against an Establishment Clause challenge, notwithstanding the fact that language in the Act was aimed at benefiting religious and other speech. *Mergens*, 496 U. S. at 248.

[8] The Subcommittee on the Constitution of the House of Representatives Committee on the Judiciary held six hearings on the legislation over two sessions of Congress. Committee on the Judiciary, House Report 106-219, p. 5, 106th Congress, 1st Session, July 1, 1999. The Senate Committee on the judiciary held three hearings. Senators Hatch and Kennedy, *Joint Statement on RLUIPA*.

[9] The *Smith* Court held that the states, and the courts, were not constitutionally required to act to remove burdens from, or to accommodate, religious exercise caused by laws of neutral applicability so long as such laws were reasonably aimed at achieving a legitimate state objective. *Id.* at 884-90.

that the Establishment Clause precludes Congress from taking such action, invoking the tri-partite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon*") to strike down the law.

The basis of the Sixth Circuit's Establishment Clause decision is that RLUIPA "favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation." *Cutter v. Wilkinson*, 349 F.3d 257, 262 (6th Cir. 2003) ("*Cutter*"). Not only is this holding out of step with the admitted "juggernaut" of other courts that have looked at the same issue (*id.*), it is also out of step with this Court's precedents and should thus be reversed.[10]

### A. The Secular Purpose of RLUIPA

The Sixth Circuit panel first found that RLUIPA failed the "secular purpose" prong of the tri-partite *Lemon* Test[11] by singling out religious rights for special protection. In doing so, Congress "abandoned neutrality" and acted with "intent of promoting a particular point of view in religious matters." *Cutter*, 349 F.3d at 263, *quoting Amos*, 483 U.S. at 327, 335. But this approach slights the conclusion made by the Court in *Amos* that "it is a permissible legislative purpose to alleviate

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[10] The Seventh Circuit, the Ninth Circuit and most recently the Fourth Circuit, have all upheld RLUIPA against Establishment Clause claims. *See Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) ("*Madison*"); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002). The Sixth Circuit in *Cutter* and the Fourth Circuit in *Madison* applied the three prong test for violations of the Establishment Clause articulated in *Lemon*, 403 U.S. at 602, but came to opposite conclusions. Several Courts of Appeals have also held that the religious accommodation provisions of RFRA (which are identical to Section 3 of RLUIPA) do not violate the Establishment Clause. *See In Re Young*, 141 F.3d at 1522; *Mockaitis v. Harcleroad*, 104 F.3d at 1522; *Sasnett v. Sullivan*, 91 F.3d at 1018; *EEOC v. Catholic Univ. of Am.*, 83 F.3d at 455; *Flores v. City of Boerne*, 73 F.3d at 1352.

[11] *Lemon*, 403 U.S. at 602.



significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. There is no reason that it should be any different for the individual exercise of religious beliefs.

The Sixth Circuit attempts to reconcile this discrepancy by distinguishing the Title VII exemption for religion in the *Amos* case as being "arguably necessary to avoid a violation of the Establishment Clause." *Cutter*, 349 F.3d at 263. RLUIPA, it says, was fundamentally different and unnecessary for the same reason and therefore discloses a governmental preference for religion. This reasoning is fundamentally flawed. It ignores the recognition that government can, and sometimes is obligated to, act in order to protect religious rights without violating the Constitution. *See, e.g., Zorach v. Clauson*, 343 U.S. 306 (1952); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) ("*Walz*"); *Wisconsin v. Yoder*, 406 U.S. at 205; *Amos*, 483 U.S. at 327. Moreover, there is simply no precedent in this Court limiting Congress' enactment of legislation protecting free exercise only for the purpose of avoiding Establishment Clause violations. Indeed, the logical extension of the respondents' reasoning is that the Free Exercise Clause is invalidated by the Establishment Clause unless secular interests are included as well, which departs from the structure and philosophical premises underlying the Religions Clauses. *See* discussion, *supra*, Section I(C).

This Court has long acknowledged, and recently affirmed, that there is and must be "play in the joints" between the Religion Clauses. *Walz*, 397 U.S. at 664, 669; *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307 (2004). The more rigid, and decidedly more hostile, view of the Religion Clauses taken by the Sixth Circuit stands in direct contrast to this Court's precedents. In the *Walz* case (upholding a New York tax exemption for religious institutions), this Court succinctly stated that:

> the general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. *Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.*

*Walz*, 397 U.S. at 669 (emphasis added). Congress' action in passing RLUIPA clearly falls within this space. It is clear that the government's actions do not have to be *devoid* of religion in order to satisfy the first prong of the *Lemon* test. *Mergens*, 496 U.S. at 226; *Widmar v. Vincent*, 454 U.S. at 263, 272. Moreover, to force disregard for such religious rights, which are affirmatively and specifically protected rights under the First Amendment, is arguably contrary to the Establishment Clause. Peradventure, when government chooses to *accommodate* religious practice, it "follows the best of our traditions" and "respects the religious nature of our people... [T]o hold that [government] may not [do so] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. at 314.

The Sixth Circuit's attempt to distinguish *Amos* on the basis that RLUIPA sweeps more broadly than the more targeted Title VII exemption at issue in *Amos* is also flawed. The court viewed Title VII's limited exemption as being a "particular requirement in prescribed circumstances" and thus a proper exercise of legislative power, but considered RLUIPA's institution of "a standard of review in every case which implicates religious conduct" as constitutionally excessive. *Cutter*, 349 F.3d at 263-64 (quoting Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*). This broader scope, says the panel,



"suggests that [RLUIPA's] actual purpose is not to accommodate religion by removing a particular obstacle to religious exercise, but 'to advance religion in prisons relative to other constitutionally protected conduct.'" *Cutter*, 349 F.3d at 263 (quoting *Kilaab Al Ghashiyah (Khan) v. Department of Corr.*, 250 F. Supp. 2d. 1016 (E.D. Wis. 2003), *overruled by Charles v. Verhagen*, 348 F.3d at 601). The answer to this argument is found in the Fourth Circuit opinion upholding RLUIPA, which correctly observes that although RLUIPA "may in some ways be broader than the specific religious exceptions that the Supreme Court has previously upheld, the central principle – that Congress may legitimately minimize government burdens on religious exercise – remains the same." *Madison*, 355 F.3d at 317.

### B. Primary Effect and Entanglement

The Sixth Circuit's perception of Congress' choice to protect prisoner religious rights as a "governmental preference" toward religion feeds into the Sixth Circuit's conclusion that RLUIPA also violates the "effects" prong of the *Lemon* test. According to the Sixth Circuit, the government abandons neutrality when it seeks to "either endors[e] a particular religion or promot[e] religion generally," *Cutter*, 349 F.3d at 262, and the "government should not prefer one religion to another, or religion to irreligion." *Id., quoting Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Because, in their view, RLUIPA gives greater protection to religious rights than to other constitutionally protected rights, it impermissibly advances religion and shows a governmental preference for religion. *Cutter*, 349 F.3d at 264.

For a law to have forbidden "effects" under *Lemon*, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337 (emphasis in original). Here, "Congress has not sponsored religion or become actively involved in religious activity, and RLUIPA in no way is attempting to indoctrinate

prisoners in any particular belief or to advance religion in general in the prisons. Congress has merely lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths." *Madison*, 355 F.3d at 317. By acting to alleviate governmental burdens on the constitutionally protected right of free exercise, Congress is not *itself* advancing religion, but simply creating a remedy *for inmates* who may choose to avail themselves of the legislatively created right to challenge arbitrary restrictions on religious exercise. Simply because those individuals choose to invoke this legal remedy does not mean that the government has impermissibly endorsed or advanced religion or religious practice or exercise. Rather, the Congress has merely provided a means for inmates to seek removal, after judicial review, of substantial and unwarranted burdens on the individual exercise of religion. The Court has previously recognized the importance of individual choice as breaking the connection between government action and religion. *See Locke v. Davey*, 124 S. Ct. at 1311; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding the Cleveland school voucher program despite the fact that parents chose to use the money to send their children to religious schools). Here, not only does RLUIPA not promote religious exercise, the break in connection served by the independent actions of inmates in choosing to exercise the legal remedy to challenge restrictions on religious exercise breaks the connection between RLUIPA and any endorsement of religion or religious exercise. *Zelman v. Simmons-Harris*, 536 U.S. at 639; *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

The Sixth Circuit asserts that it is "well known from the history of constitutional law [that] the change that RLUIPA imposes is revolutionary." *Cutter*, 349 F.3d at 264. But RLUIPA seeks to remove only the "most substantial burdens States impose upon prisoners' religious rights, while giving States' penological interests due consideration. The statute does not promote religious indoctrination, nor does it guarantee



prisoners unfettered religious rights, and not every challenge under RLUIPA will be deemed valid." *Charles v. Verhagen*, 348 F.3d at 611. In fact, it seems that most RLUIPA challenges are denied and prison officials prevail "the overwhelming majority of the time." *Madison*, 355 F.3d at 321 (citing Note, *Developments in the Law – Religious Practice in Prison*, 115 Harv. L. Rev. 1891, 1894 (2002)).[12] RLUIPA does not impose "affirmative duties on states that would require them to facilitate or subsidize the exercise of religion. RLUIPA instead calls for exactly the opposite — forbidding states from imposing impermissible burdens on religious worship so that prisoners may practice their religion free from unlawful interference." *Mayweathers v. Newland*, 314 F.3d at 1068-69. Thus, RLUIPA has not worked the "revolutionary" change that *Cutter* insists and has not resulted in any government advancement of religion.

The idea that Congress impermissibly advances religion when it acts to provide a means of lifting burdens on religious exercise, but not other rights, is simply insupportable as a matter of law. "There is no requirement that legislative protections for fundamental rights march in lockstep,"

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[12] In their Joint Statement in the Congressional Record upon passage of RLUIPA (146 Cong. Rec. S 7774, July 27, 2000), Senators Hatch and Kennedy indicated that "[t]he Department of Justice reports that RFRA 'has not been an unreasonable burden to the Federal prison system,' and that the federal Bureau of Prisons has experienced only 65 RFRA suits in six years, most of which also alleged other theories and would have been filed anyway." *Id., citing* Letter from Robert Raben, Assistant Attorney General, to Senators Hatch and Leahy (July 19, 2000). In addition, the Senators reported that "[o]ther empirical studies also show that religious liberty claims are a very small percentage of all prisoner claims, that RFRA led to only a very slight increase in the number of such claims, and that on average RFRA claims were more meritorious than most prisoner claims." *Id., citing* Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. Davis L. Rev. 573 (1999).

*Madison*, 355 F.3d at 318, and no requirement that Congress provide remedial legislation for all persons or all rights enumerated in the Bill of Rights. In *Amos*, this Court emphasized that: "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. And as the Fourth Circuit noted, "No provision of the Constitution even suggests that Congress cannot single out fundamental rights for additional protection. To attempt to read a requirement of symmetry of protection for fundamental liberties would...conflict with all binding precedent." *Madison*, 355 F.3d at 319.

The Sixth Circuit placed particular emphasis on the fact that there is "no proof that religious rights are more at risk in prison than other fundamental rights." *Cutter*, 349 F.3d at 265-66 (quoting *Madison*, 240 F. Supp. 2d at 566, 576, (W.D. Va. 2003), *reversed by Madison*, 355 F.3d 310). But in other cases where the Court has upheld religious exceptions, there was no requirement of proof that the religious rights were more threatened more than other rights. *See, e.g., Amos*, 483 U.S. at 327 (upholding exception to Title VII requirements for religious employers); *Walz*, 397 U.S. at 664 (upholding property tax exemptions for houses of worship); *Zorach v. Clauson*, 343 U.S. at 306 (upholding statutes that allow release time for public school students for religious instruction). Moreover, not only has Congress been presented with documented instances of prolonged litigation with prison officials over arbitrarily inhibiting religious exercise, such as recording priest-penitent confessions, denying communion and stripping prisoners of crosses and other religious icons, national leaders of religious outreaches to prisoners have also testified before Congress, documenting other cases of unwarranted infringement on religious exercise by prison administrators. Senators Hatch and Kennedy, *Joint Statement on RLUIPA*.



It is true that many fundamental rights are of necessity burdened in the prison environment—such is the very nature of being a prisoner. However, Congress has made the *legislative* judgment that the suppression of religious liberty is not required in order to advance penological purposes. Though other constitutional rights may be burdened, the "Constitution itself provides religious exercise with special safeguards." *Id.* Providing a remedy to permit the exercise of the principal liberty upon which our nation was founded was deemed to serve the important purposes of rehabilitation, personal motivation and the advancement of moral standards in the prison environment and, therefore, deserving of accommodation within reason. *See, e.g.,* Byron R. Johnson, *et al., Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs,* Justice Quarterly, March 1997 (study showing that prisoners most active in Bible studies were significantly less likely to be rearrested after release). Therefore, Congress' choice in protecting those rights over others is not attributable to governmental favoritism of religion as much as to sound social policy and the advancement of protected constitutional interests.

### C. Endorsement of Religion Vis-à-Vis Non-Religion

The Sixth Circuit also worried that since "the rules do not apply with the same force to the religious as to the agnostic or atheist," Congress, it says, has advanced religion by "giving religious prisoners a preferred status in the prison community." *Cutter*, 349 F.3d at 266-67 (internal quotation omitted). But accommodation does not equal preference. In enacting RLUIPA, Congress reflected the Framers' belief that religious belief and "the free exercise thereof" hold a special place in the Bill of Rights and in American society. Simply because some inmates have different needs than others on account of religious beliefs does not mean that the government favors them in accommodating those beliefs, just as it does not follow that the government favors Muslims when it allows

them to possess a prayer mat, as required by their religion, and not a Christian inmate whose religious beliefs do not require the use of such a mat. If the agnostic or atheist has no spiritual needs being burdened, there is nothing to accommodate.

The Sixth Circuit further asserted that besides the appearance of endorsement by the government, RLUIPA also has the effect of "encouraging prisoners to become religious in order to enjoy greater rights...induc[ing] prisoners to adopt or feign religious belief in order to receive the statute's benefits." *Cutter*, 349 F.3d at 266. However, if this reasoning stands, logic dictates that the deeply traditional exception for conscientious objectors be eliminated as well, since it could arguably have the very same effect. The fact that the government will allow exemptions because of religious belief may encourage one to feign religious belief to gain conscientious objector status. This possibility should not be allowed to trump the long-recognized importance and sustained value of freedom of conscience. As Justice Harlan Fiske Stone wrote, "it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." *United States v. Seeger*, 380 U.S. 163, 170 (1965) (*quoting* Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919)). Any concern that the Act creates "incentives for secular prisoners to cloak their secular requests in religious garb and thus may increase the burden on state and local officials in processing RLUIPA claims" is "not a concern under the Establishment Clause...it speak[s] more to the wisdom of the law." *Madison*, 355 F.3d at 319. This Court's place is not to question the wisdom of Congress' legislative judgment, but rather to test that judgment against the Constitution. As this Court's jurisprudence recognizes, "[w]e do not sit as a 'superlegislature' to second guess...policy choices." *Ewing v. California*, 538 U.S. 11, 28 (2003). Where there is no constitutional violation, administrative difficulties should play no role in the Court's decision.

Finally, the Sixth Circuit's opinion calls into question



entire classes of previously approved legislative religious accommodations, including not only the "conscientious objector" standard or exceptions to compulsory military service for clergy and divinity students, but also the "clergy-penitent privilege," various tax exemptions and exemptions from compulsory public schooling and curricula. *Madison*, 355 F.3d at 320. Indeed, the Sixth Circuit's reasoning would "work a profound change in the Supreme Court's Establishment Clause jurisprudence and in the ability of Congress to facilitate the free exercise of religion in this country." *Id.* Given the recognized importance of religious exercise by the Constitution, the Court and the American people, RLUIPA must be upheld as a legitimate legislative accommodation to protect religious practice.

## CONCLUSION

James Madison, the architect of the Religion Clauses, was all too aware of the need to protect the rights of those whose religious values seemed unusual or out of the ordinary. He was aware of imprisoned ministers preaching from jailhouse windows and decried their persecution. It was his primary concern, notwithstanding near descendants who subscribed to the religion of the State Church of England, to protect the rights of dissenters and to guarantee inalienable liberties. Likewise, Colonial legislatures enacted exemptions, taking into account individual religious liberties. Congress now follows in that historical tradition with a modern-day accommodation to insular religious minorities by providing a legal remedy for heightened consideration of facts and circumstances of restrictions on religious practices in an extreme and otherwise closed environment, operating with little outside supervision or oversight.

In his concurring opinion in *City of Boerne v. Flores*, Justice Scalia asked the question whether the people, through their elected representatives, or this Court shall control the outcome of concrete cases where general, nondiscriminatory

laws place unreasonable burdens upon religious practice. In response, he declared, "It shall be the people." 521 U.S. at 507, 544. In answering the similar question in the present case, "whether the people, through their elected representatives, may provide, or whether the court shall prohibit, a legal remedy to accommodate religious exercise in prisons," the response should be the same: "It shall be the people."

Respectfully submitted,

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